Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

SAMUEL LEWIS, Director of Department of Corrections, Arizona State Prison,

PETITIONER,

-vs-

TERRY L. WEBB,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Was the holding of *Idaho v. Wright* a "new rule" for the purposes of federal habeas review or was that holding dictated by precedent and thus applicable to a state case tried in 1987?

2. Although corroborating evidence cannot support hearsay reliability under *Idaho v. Wright*, can noncorroborating evidence support unreliability?

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OPINION BELOW

On August 24, 1994,[2] the Ninth Circuit Court of Appeals, in a divided opinion, overturned the district court and granted a writ of habeas corpus to a state prisoner convicted of molestation of a child and sexual conduct with a minor. *Webb v. Lewis,* 33 F.3d 1079 (9th Cir. 1994). The court denied the petition for rehearing with suggestion for rehearing en banc on January 20, 1995.

STATEMENT OF JURISDICTION

Respondent's petition was mailed on March 15, 1995. Thus it was filed within the 90-day time limit of Rule 13, Rules of the United States Supreme Court, which calculates the time for the filing of the petition from the denial of a motion for rehearing in the lower court. Rule 13.4, U.S. Sup.Ct. Therefore this Court's jurisdiction vests pursuant to the United States Constitution, article III, § 2 and 28 U.S.C. § 1257(a).

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[2] Opinion amended October 13, 1994 and December 8, 1994.

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Rule 804(b)(5) of the Arizona Rules of Evidence states:

> *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and

the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the part.

STATEMENT OF THE CASE

Procedural History of the Case.

Respondent was charged with one count of molestation of a child and one count of sexual conduct with a minor, both class 2 dangerous crimes against children. A jury convicted him as charged. The trial court sentenced him to presumptive, consecutive prison terms of 17 years and 20 years. Respondent appealed his convictions and sentences. He challenged the admissibility of the victim's out-of-court statements to her mother, her babysitter, and her psychotherapists. The Arizona Court of Appeals affirmed both convictions and sentences on July 25, 1989 by Memorandum Decision. The Arizona appellate court upheld the trial court's finding that the girl's statements to her mother and her babysitter had sufficient guarantees of trustworthiness to be admissible under the residual hearsay exception found in Rules 803(24) and 803(b)(5), Arizona Rules of Evidence. The Arizona court found that the statements to the psychotherapists were admissible under the medical diagnosis exception to the hearsay rule, Rule 803(4), Arizona Rules of Evidence. Alternatively, the court of appeals found that these

same statements were also admissible under the residual hearsay exception to the hearsay rule. The court further found that admission of the videotaped interview if error, was harmless error because the videotape was cumulative to other evidence properly admitted. Thus the Arizona court rejected Respondent's claims based upon the confrontation clause. On December 12, 1989, the Arizona Supreme Court denied Respondent's petition for review.

Respondent filed a petition in the federal district court alleging that the admission of the victim's out-of-court statements to the four witnesses violated his rights under the Confrontation Clause of the Sixth and Fourteenth Amendments. The district court held that the Confrontation Clause was not violated because the statements to the mother and babysitter admitted under a residual hearsay exception contained particularized guarantees of trustworthiness. The district court also found that the statements to the psychotherapists were properly admitted under the firmly rooted hearsay exception of statements made for the purpose of diagnosis and treatment. Therefore, those statements presumptively had sufficient trustworthiness to avoid a Confrontation Clause violation. And

alternatively, those statements too had particularized guarantees of trustworthiness.

The Ninth Circuit Court of Appeals reversed the district court and held that the videotaped interview with the victim, conducted by a social worker, was not admissible under the hearsay exception for medical diagnosis or treatment, and it did not have sufficient guarantees of trustworthiness to be admissible under the residual exception to the hearsay rule and therefore violated the Defendant's right of confrontation.

Facts of the Case.

Connie Martin babysat the 2-year-old victim, Heather, from December 1984, to June 1986. The victim's mother, Leslie, then started often leaving the girl overnight with her neighbors, Respondent and his friend, Cindy. Leslie noted that Heather was reluctant to stay at Respondent's residence. On one occasion at home, the 2-year-old entered the bathroom and saw her mother applying prescription cream to her vaginal area. She told her mother, "Terry put medicine on me." Leslie confronted Respondent (Terry) and Cindy with this comment, but they denied it. The two

of them moved away and Leslie started leaving Heather with Connie Martin, her former babysitter.

The mother eventually asked the babysitter about the "Terry put medicine on me" statement. The babysitter related that Heather had told her, "Terry put medicine in me" like a "bolt out of the blue." In addition, Heather said such things as "Terry was a bad bad boy. He pulled down his panties. And he put his finger up in my little thingy and it hurt my tummy real bad." She also demonstrated to Connie how Terry put a fist in her face and said, "don't you tell, Heather."

While riding with the babysitter in the car in the Parker, Arizona area, Heather spontaneously pointed out the Kahok Motel and said, "Terry is there and he's going to hurt me." At one point, Respondent lived at the Kahok Motel while he was babysitting the girl. Heather made other statements to the babysitter, such as "Terry put his pee pee in her mouth and it dripped in her mouth" as she showed Connie Martin how it made her gag. Heather also sat spread-eagle on a chair and pointed to her vagina to demonstrate where "Terry put his pee pee in my side." Heather later repeated

these statements to two child abuse experts. She asked to have the doctor take the "medicine" out of her. The state also presented photographic medical evidence and expert testimony that the girl's abnormal genital area was consistent with repeated episodes of sexual abuse.

By the time of trial, Heather was 3 years old. She refused to communicate about the incidents when both parties attempted to videotape her testimony. The trial court found her to be unavailable. Respondent made no attempt to call her during trial.

ARGUMENTS

I

THIS COURT'S HOLDING IN *IDAHO V. WRIGHT* WAS A NEW RULE THAT SHOULD NOT BE APPLIED ON COLLATERAL REVIEW.

The federal appellate court has reversed Respondent's convictions based upon a holding by this Court that did not exist when this case was tried in 1987. To impose the requirements of the 1990 decision in *Idaho v. Wright* on the state courts, as the Ninth Circuit did in this case tried in 1987, is an improper application of a new rule to a case on collateral review. *Gilmore v. Taylor,* ___

U.S. ___, 113 S. Ct. 2112, 124 L. Ed. 2d 306 (1993); *Saffle v. Parks,* 494 U.S. 484, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990); *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L Ed. 2d 334 (1989). *See also Butler v. McKellar,* 494 U.S. 407, 110 S. Ct. 1212, 108 L. Ed. 2d 347 (1990); *Penry v. Lynaugh,* 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989). As a threshold matter, a court must determine first if the relief the petitioner seeks would create a "new rule." *Penry v. Lynaugh,* 492 U.S. 302, 109 S. Ct. 2934, 2944, 106 L. Ed. 2d 256 (1989) (*citing Teague v. Lane,* 489 U.S. 288, 109 S. Ct. 1060, 1069, 103 L. Ed. 2d 334 (1989) (plurality opinion)). A "new rule" is when the relief sought "breaks new ground or imposes a new obligation on the states or the Federal Government." *Penry*, 492 U.S. at 312; *Teague,* 489 U.S. at 298. A case announces a new rule if "the result was not dictated by precedent" existing at the time the defendant's conviction became final. *Penry*, 492 U.S. at 312 (emphasis in original), *Teague,* 489 U.S. at 298.

Prior to *Wright,* many jurisdictions admitted out-of-court statements of child victims under the residual exception by referring

to extrinsic corroborating evidence just as the trial court did in this case. *See, e.g, United States v. Bailey,* 581 F.2d 341, 349 (3d Cir. 1978) ("(T)he trustworthiness of a statement should be analyzed by evaluating not only the facts corroborating the veracity of the statement, but also the circumstances in which the declarant made the statement and the incentive he had to speak truthfully or falsely."). The dissent in *Wright* gave other examples of state and federal courts that looked to corroborating evidence to determine trustworthiness prior to *Wright*. 497 U.S. at 829 n.2. This shows that *Wright* set forth a new rule.

Under *Penry* and *Teague,* new rules will not be applied in federal habeas corpus unless they fall into one of two exceptions. The first exception is if the rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 489 U.S. at 303. The second exception is the "procedure at issue must implicate the fundamental fairness of the trial." *Teague*, 489 U.S. at 304 (emphasis added). Neither exception applies to the evidentiary issue in this case. It is wholly improper under *Teague* to reverse a state

court evidentiary ruling based upon law that was not in existence when the case was tried and became final.

II

IDAHO V. WRIGHT FORBIDS USE OF CORROBORATING EVIDENCE TO DETERMINE UNTRUSTWORTHINESS.

In *Idaho v. Wright*, this Court said corroborating evidence may not be considered because it "would permit . . . bootstrapping on the trustworthiness of other evidence at trial." *Id.* 497 U.S. at 823. The Court held that a finding of trustworthiness must be based on a consideration of the totality of the circumstances, but that "the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief." *Id.*, 497 U.S. at 814. The standard is whether "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility." *Id.* at 815. Thus, the Court held that a trial court may not consider independent corroborating evidence in judging the admissibility of a hearsay statement sought to be admitted pursuant to a residual hearsay exception. *Id.* at 816–17.

It is a perversion of this Court's holding in *Wright* to say that while corroborating evidence is irrelevant to a determination of trustworthiness, it can be used to show untrustworthiness. Yet the Ninth Circuit's opinion extends *Wright* beyond its holding by claiming that although corroborating evidence cannot support reliability, noncorroborating evidence can support unreliability. If this evidence is irrelevant on the issue of reliability, it should also be irrelevant on the question of unreliability. As the dissent in *Webb* points out, this reasoning is inconsistent with the Ninth Circuit's holding in *Swan v. Peterson,* 6 F.3d 1373, 1381 (9th Cir. 1993), *cert. denied*, 115 S. Ct. 479 (1994) (*Wright's* caution against reference to other evidence at trial suggests noncorroborating evidence cannot be used to demonstrate unreliability). By its December 8, 1994, amendment to the opinion, the *Webb* majority merely refers to *Swan* as dicta on this point.

Furthermore, this extension of *Wright* actually put the majority in the business of determining the admissibility of evidence contrary to *Estelle v. McGuire,* 502 U.S. 62, 69, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) (evidentiary rulings do not raise federal constitutional

questions reviewable in habeas corpus proceedings). A large part of the *Webb* opinion discusses extrinsic evidence at trial and the inferences to be drawn from it. 33 F.3d at 1084–85. That is not the role of a federal appellate court on collateral review. The majority's look at the circumstances surrounding the statement also strays from the role of the federal court on collateral review. The majority holds that age-appropriate language about sex and body parts indicates unreliability. 33 F.3d at 1085. In other words, this 3-year-old's failure to use sophisticated sexual terminology makes her statement unreliable. That is contrary to the same court's holding in *United States v. Nick,* 604 F.2d 1199, 1204 (9th Cir. 1979), that age-appropriate testimony signifies *reliability.* 604 F.2d at 1204 ("childish terminology has the ring of verity"). If childish terminology can signify both reliability and unreliability, then the inferences to be drawn from the facts obviously belongs to the trial court, not a federal appellate court reviewing a record 7 years later. The fact that the Ninth Circuit had a videotape to view over and over in this matter does not change the law with regard to that court's role in reviewing state evidentiary rulings. Mere

disagreement with the trial court's inferences drawn from the same facts does not make out a constitutional violation.

As noted by the dissent, the law sanctions a trial court considering the sexual terminology of a child molestation victim in determining reliability, but it does not dictate that age-appropriate terminology equals unreliability. 33 F.3d at 1086. This Court's previous case law supports the dissent. There is no mechanical test for determining particularized guarantees of trustworthiness. Courts have considerable leeway in their consideration of appropriate factors. *Wright,* 497 U.S. at 816. Because there is no mechanical test, it is also not correct for the *Webb* majority to hold that subsequent consistent statements by a victim cannot be spontaneous once the victim has been previously questioned about the case. The opinion states that if the victim has talked about the case before, spontaneity means unreliability. 33 F.3d at 1084. Petitioner submits that *Idaho v. Wright* never meant to put state trial courts into such a straight jacket. The dissent's observed conundrum is correct. The opinion tells the police that they should not investigate because only the first statement counts. Like childish terminology, spontaneity

may or may not indicate reliability. It is not the federal court's role to say whether it does or does not in a particular case. It is the role of the federal habeas court to see that the state trial court considered appropriate factors that are supported by the record thus assuring the defendant a fair trial.

Lastly, Petitioner would ask the Court to consider *Brecht v. Abrahamson,* ___ U.S. ___, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). On collateral habeas corpus review, the harmless error standard is that the prisoner must establish that the constitutional violation "had a substantial and injurious effect or influence in determining the jury's verdict." 113 S. Ct. at 1722. That standard is not met unless the state prisoner establishes that the constitutional violation resulted in "actual prejudice." *Id.*

When the victim's out-of-court statements in a child sex case have been properly admitted by witness testimony, error in admitting an additional videotape of the child's statements may be harmless. *Larson v. Nutt,* 34 F.3d 647, 648 (8th Cir. 1994), *cert. pet. filed,* Nov. 14, 1994; *Dana v. Department of Corrections,* 958 F.2d 237, 240 (8th Cir.), *cert. denied,* ___ U.S. ___, 112 S. Ct. 3043 (1992);

see Dolney v. Erickson, 32 F.3d 381, 382 (8th Cir. 1994), *cert. pet. filed*, Nov. 18, 1994. The *Webb* opinion gives only a one-sentence nod to the *Brecht* harmless error standard. Petitioner submits that the state is entitled under *Brecht* to as much discussion of the other evidence in the case as the *Webb* majority gave to the discussion of extrinsic evidence of unreliability of the tape. In *Brecht,* 113 S. Ct. at 1722, this Court discussed all of the evidence in the record as a whole before making its harmless error determination. That was not done in this case.

CONCLUSION

The 1990 decision in *Idaho v. Wright* should never have been applied to this 1987 state trial. The Ninth Circuit also misread *Wright* when it decided that noncorroborating evidence was relevant to determine untrustworthiness under the residual hearsay exception. Lastly, the appellate court gave short shrift to the review for harmless error under the *Brecht* standard. The *Webb* opinion should be vacated and district court order denying the federal habeas writ should be reinstated.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TERRY L. WEBB,	)	No. 93-16167
	)	
Petition-Appellant,	)	D.C. No.
	)	CV-90-01608-SMM
	)	
v.	)	ORDER AND
	)	AMENDED
SAMUEL A. LEWIS,	)	O P I N I O N
	)	
Respondent-Appellee.	)	
	)	

Appeal from the United States District Court
for the District of Arizona
Stephen M. McNamee, District Judge, Presiding

Submitted May 12, 1994*
San Francisco, California

Filed August 24, 1994
Amended October 13, 1994

Before: Warren J. Ferguson, John T. Noonan, Jr., and
Thomas G. Nelson, Circuit Judge

Opinion by Judge Noonan; Dissent by Judge T.G. Nelson

*The panel unanimously finds this case suitable for submission without oral arguemnt. Fed.R.App.P. 34(a); 9th Cir.R.34-4.

COUNSEL

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Diane M. Ramsey, Assistant Attorney General, Phoenix, Arizona, for the respondent-appellee

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OPINION

NOONAN, Circuit Judge

Terry L. Webb appeals the denial by the district court of a writ of habeas corpus freeing him from imprisonment by the state of Arizona. Holding that there has been a gross denial by Arizona of a right secured to Webb under the Confrontation Clause of the United States Constitution, we reverse the judgment of the district court and direct the issuance of the writ.

FACTS AND PROCEEDINGS

In the summer of 1986 Leslie Morton was separated from her husband and living in a trailer park with her two children, David, age 10, and Heather, age 2 1/2. She worked the night shift at the Little Brown Jug, finishing around midnight or in the small hours of the morning.

Because of her work, Leslie Morton had to find babysitters for her children. She usually left David with her own parents but because of Heather's difficult behavior she thought her parents would not be able to cope with her. She found other babysitters in her next-door neighbors in the trailer park, Terry Webb and his companion Cindy Hammontree, who had a child of their own, Cody. Leslie Morton thought of Terry and Cindy as her best friends.

During the summer months Heather Morton stayed on occasion with Terry and Cindy and wrestled with Cody. When Heather stayed overnight with Terry and Cindy, her mother would bathe her in the morning. Her mother never noticed any signs suggesting abuse by Terry or by Cindy. Heather never spoke to her mother of any abuse. In late August 1986, when her mother was putting on cream for a bladder infection and referred to it as "medicine," Heather said to her, "Terry put medicine on me." Her mother had "no idea" of what Heather meant.

In September 1986 Leslie Morton began to use a new babysitter during the day, Connie Martin. Connie used her home to babysit a number of children, supplementing her income as a church

custodian. On four other occasions Connie Martin had reported to the authorities that a child in her care had suffered sexual abuse.

On September 23, 1986, when Connie was "hustling about trying to find her checkbook" and paying little attention to the children as "there was kind of a lot of chitter-chat," Heather said that Terry had put medicine in her. She then said, "Terry is a bad man, he hurt me." Connie Martin's husband then asked Heather to tell his wife why Terry was a bad man. Heather went on, according to Connie Martin, to accuse Terry Webb in childish language of digitally assaulting her genitals and of instructing her not to tell. Connie Martin's response was "to mask the horror of it the best that I could," to put her arms around her, and to ask her questions "in the most non-threatening way" in order "to derive some basic information." Connie was immediately convinced of Terry's criminal guilt: "I emotionally didn't feel like I could stand the horrendousness of this heinous crime that was committed against this child."

On September 30, 1986, Connie Martin told Heather. "Heather, you know what Terry did to you was very very bad, and that

Heavenly Father and Jesus does not like bad things to happen to his little children, and He has given us special friends to help us." According to Martin, this statement was made as a way of preparing Heather for "special friends" from the Children Protective Service of the Division of Economic Security of the State of Arizona.

Also on September 30 Connie Martin for the first time informed Leslie Morton of what Heather had said to her about Terry. This conversation was overheard by Heather, who ran over and said, "Terry no do those things to me, Connie."

Connie Martin then informed the district attorney's office of LaPaz County, Arizona about what she said Heather had first said to her by way of accusations against Terry Webb. Allan Duprey from the Victim Witness Office in LaPaz County arranged to have Heather interviewed in San Diego, California at the Center for Child Protection at Children's Hospital and Health Center. Duprey accompanied Heather and her mother to the Center on October 16, 1986. At the Center for Child Protection Heather was interviewed by Linda Proctor, a social worker holding a B.A. and M.A. in Social Work from San Diego State University. This interview was

videotaped and constituted part of the state's case against Terry Webb. It is discussed at greater length below.

After the interview with Proctor, Heather was medically examined at the Center for Child Protection by Sylvia Strickland, a physician specializing in child abuse cases and often consulted by law enforcement and child protection services. Strickland found fibroblasts in Heather's hymen that she interpreted to be scar tissue from the use of force on the hymen; she also formed the opinion that the opening of the hymen had been enlarged beyond its normal size. She believed that the abrasions would have been caused by several episodes over a period of no less than two months. She had no means of knowing when the episodes would have occurred, except that it would have been more than two weeks before the examination and not over a year from October 1986.

Webb was indicted. A pretrial hearing was conducted on February 18, 1987 as to the admissability of certain statements against him. The hearing was convened pursuant to Arizona Criminal Code Sec. 13-1416, which made admissible a statement by a minor under the age of 10 describing any sexual offense witnessed by the minor

provided that, in a hearing before the judge, it was established "that the time, content and circumstances of the statement provide sufficient indicia of reliability" and that the minor testified or, if unavailable, there was corroborative evidence of the statement. In 1987 the Arizona Supreme Court found this statute to be unconstitutional. State v. Robinson, 153 Ariz. 191, 198, 735 P.2d 801, 808 (1987). At the hearing in 1987 held prior to this decision, the trial court found the videotape and other hearsay reports of Heather's statements to be admissible.

Webb's trial followed. No person who had seen the alleged criminal acts of Webb testified. Heather Martin herself refused to answer questions put to her by the judge outside the courtroom. The state did not present her as a witness. Neither did the state present as a witness Terry Webb's companion Cindy, who, if some of the hearsay was correct, had actually witnessed the abuse. The state's entire case connecting Webb to the injuries found by Dr. Strickland was made up of hearsay reported by Connie Martin, Leslie Morton and Linda Proctor and of the videotaped interview with Heather.

The videotape was taken by the jury into the jury room during its deliberations.

Webb was convicted of both counts and sentenced to consecutive prison terms of 17 years and 20 years for a total of 37 years imprisonment. He appealed, contending that his Confrontation Clause rights had been violated. The Arizona Court of Appeals affirmed his conviction. The Arizona Supreme Court denied his petition for review.

On October 17, 1990 Webb filed pro se his petition for habeas corpus in the federal district court for the District of Arizona, again alleging the deprivation of his Confrontation Clause rights. On February 27, 1991 the case was referred to a magistrate. On July 15, 1993, one year and four months later, the magistrate made a report and recommendation to deny the petition. Nine months after this report and over two and a half years after the filing of the petition, on April 30, 1993, the district court denied Webb's petition. The district court also declined to provide counsel for Webb.

Webb appealed. A motions panel of this court ordered that he be provided with counsel.

ANALYSIS

The videotape of Linda Proctor interviewing Heather Morton is a film of thirty minutes duration, in which Proctor interviews Heather about the alleged sexual acts performed on her by Webb. The purpose of this interview, according to Proctor's own testimony, was to obtain a statement from her. The interview is conducted with the care and skill of a person who for six years has interviewed alleged victims of child abuse. The social worker first interests Heather in playing with dolls and engages her in questions about her home and family and babysitter. The interviewer then focuses on the sexual characteristics of the dolls and induces Heather to comment on them. In the course of the half-hour, Proctor repeatedly turns the conversation into questions about the conduct of Terry to Heather, salting the conversation three times with the comment that Terry is a bad man or did a bad thing. The social worker asks Heather directly whether she suffered any injury from Terry and whether she now has any injury; that is the extent of her questions that could be

considered medical. Her focus is on discovering sexual abuse. She persistently returns to this theme as Heather's attention wanders to the dolls. In a way that would never be permitted in a judicial setting, Proctor repeats questions that Heather declines to answer.

The problem of obtaining evidence of sexual abuse of a small child while observing the requirements of due process of law has led to the admission of evidence under firmly rooted exceptions to the hearsay rule. Otherwise the statements are " 'presumptively unreliable and inadmissible for confrontation clause purposes' ". *Idaho v. Wright,* 497 U.S. 805, 818, 110 S.Ct. 3139, 3148, 111 L.Ed.2d 638 (1990), *quoting Lee v. Illinois,* 476 U.S. 530, 543, 106 S.Ct. 2056, 2063, 90 L.Ed.2d 514 (1986).

[1] The state of Arizona contends that the videotape is admissible "under the firmly rooted hearsay exception of medical diagnosis or treatment and thus no further guarantees of trustworthiness are required." The exception to the hearsay rule invoked by the state is, of course, firmly rooted. It is astonishing, however, to have the state contend that Proctor, a social worker, was engaged in medical diagnosis or treatment. Nothing in the videotape supports this

statement. At the trial the prosecutor offered an argument not repeated on appeal: that the interview by Proctor was preparatory to the medical examination by Strickland, and the latter could be considered therapeutic. This argument, while showing that Strickland was prepared by Proctor to find that Heather had been abused, does not convert the social worker's interview into a medical procedure. Moreover, Strickland was being consulted by Allan Duprey of the Victim Witness Office for law enforcement purposes; she was not prescribing for Heather as her patient.

[2] The state now argues: "Heather had no motive in traveling to a San Diego hospital and making the statements other than a patient seeking or needing treatment." There is not the slightest indication in Heather's conduct that she is a patient seeking or needing treatment. She was brought from Arizona to California at the request of the prosecuting authorities and in the company of a state official charged with protecting witnesses in criminal trials. Her only reported comment as the adults took her to California was concern that she would be made to pull down her panties. To suppose that Heather had the capacity to seek medical help on her

own or to suppose that the purpose of the victim witness protection program was seeking therapy is to engage in fantasy. It is on the basis of such fantasy that the state has defended its use of the videotape in Webb's trial.

[3][4][5] Even if the hearsay does not fit within an established exception, however, its admissibility is not barred by the Confrontation Clause if, considered apart from any corroborating evidence, there was " 'a showing of particular guarantees of trustworthiness' ". *Idaho v. Wright,* 497 U.S. at 818, 110 S.Ct. at 3148, *quoting Ohio v. Roberts,* 448 U.S. 56, 66, 110 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980). The circumstances to be considered are the totality of circumstances "that surround the making of the statement and that render the declarant particularly worthy of belief"--so worthy of belief " 'that the test of cross-examination would be a work of supererogation.' " *Idaho v. Wright,* 497 U.S. at 819, 110 S.Ct. at 3149, quoting *Wigmore on Evidence* Sec. 1420 (1974 ed.). The guarantees of trustworthiness "must be at least as reliable as evidence admitted under a firmly rooted hearsay exception." *Idaho v. Wright* at 821, 110 S.Ct. at 3149, *citing Ohio*

v. Roberts, 448 U.S. at 66, 110 S.Ct. at 2539. An "affirmative reason, arising from the circumstances in which the statement was made," is necessary to rebut the presumption of unreliability and exclusion under the Confrontation Clause. The state contends that the court is imposing a new rule. To the contrary, *Idaho v. Wright,* 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990) applied established precedents in measuring the admissibility of hearing from a child. *Id.*

The Supreme Court declined to list what would constitute the necessary guarantees, but, without approving the results reached in the cases it cited, it gave a list of factors that could appropriately be considered by a trial court: "use of terminology unexpected of a child of similar age"; "spontaneity and consistent repetition"; "mental state of the declarant"; "lack of motive to fabricate." Id. 497 U.S. at 821-822, 110 S.Ct. at 3150. In *Idaho v. Wright* itself the trial court had admitted the hearsay of a child 2 1/2 years old, finding (1) that she had no motive to lie and (2) that the statements made to her doctor about Daddy touching her pee-pee were not "of the type 'that one would expect a child to fabricate.' " *Id.* at 826,

110 S.Ct. at 3152, citing trial judge. The Supreme Court of Idaho found the presumptive unreliability of these statements to be unaffected by these findings and reversed the defendant's conviction. The Supreme Court of the United States agreed, holding that the circumstances found by the trial court offered "no special reason for supposing that the incriminating statements were particularly trustworthy." *Id.*

The Supreme Court of Idaho also found that the trial court had erred in admitting the two-year-old's statement to her doctor, "he does it a lot more with my sister." The Supreme Court of the United States agreed, although "the spontaneity of the statement and the change in demeanor" suggested that she was telling the truth. The Supreme Court emphasized that "it is possible" that where there was prior interrogation or prompting or manipulation by adults, spontaneity was an inaccurate indicator of trustworthiness. *Id.* at 826-27, 110 S.Ct. at 3152-53.

[6] In the light of *Idaho v. Wright* and its specific examples of testimony that failed to rebut the presumption of unreliability, we examine whether circumstances surrounding the making of Heather's

statements on the videotape made her particularly worthy of belief so that the test of cross-examination would have been a work of supererogation. As "no mechanical test prevails," *Swan v. Peterson,* 6 F.3d 1373, 1379 (9th Cir.1993), the character of the guarantees of trustworthiness in this case must be weighed. We are not to second-guess the state courts. Id. at 1378. It is not our task to retry the case, or to determine Webb's guilt or innocence, or even to decide if Heather's statements were true. But on the ultimate determination of trustworthiness we act de novo. Id. at 1379. Our task under the Constitution is to determine if these presumptively unreliable statement were made under circumstances affirmatively establishing that they were so reliable that cross-examination of Heather was "of marginal utility." *Idaho v. Wright,* at 820, 110 S.Ct. at 3149.

[7] Taken by itself, the videotape does not carry guarantees of trustworthiness. Heather's language is not "unexpected of a child of similar age." The video does not contain a declaration of Heather made soon after the alleged assaults; her "state of mind," as used in the case cited by Wright, was not the state of mind of one

excitedly reporting a recent assault. In the interview, within two minutes of the start of filming, Heather told Proctor that Terry pulled down his pants and put medicine in her. Captured by the camera, her statement comes through with a force and vividness and apparent spontaneity that are striking. Such a precise statement to a stranger, a person Heather had never seen before, invites reflection on what had prepared Heather to be so candid. The inescapable facts are that, for almost a month preceding the interview, she had been asked about Terry's conduct by Connie Martin, Mr. Martin, her mother, Allan Duprey and other state authorities. If the Supreme Court of the United States in Idaho v. Wright found the mere possibility of prior interrogation to destroy spontaneity as a valid indicator, a fortiori Heather's initial accusation on the tape must be stamped as insufficiently reliable and as the product of previous questioning.

Thereafter on the tape, Heather gave a variety of answers about Terry after Proctor had deliberately probed with questions about Terry's conduct and after Proctor had described Terry or his actions as bad. In addition, Heather's accusations are marked with grave

inconsistency on the principal sexual allegations--according to Heather, Terry did and did not engage in oral sex with her; according to Heather, his vaginal assault on her was by medicine obtained from a bottle.

The videotape fails to pass the criteria set by *Wright*. There are additional reasons for holding it unreliable. *Wright* forbids recourse to other evidence to corroborate the trustworthiness of the hearsay offered; *Wright* does not forbid recourse to other evidence that confirms the presumptive unreliability of the hearsay. We are not bound by the dictum in *Swan,* supra at 1391 interpreting Wright as suggestingthecontrary. While the evidence here is not essential to our holding, there is a good deal of such evidence.

As to consistency, Heather on September 30, 1986 had denied that Terry had done "those things to me." In the videotape interview she used the term "medicine" in a way that could have been understood to mean male semen, but her usage of this term varied. For example, on December 10, 1986, in an interview with Jacqueline Scheider, a psychotherapist, Heather told her: "They spilled the medicine all over Mommy's car and Mommy had to clean

it up." Asked about this incident, her mother said that she, the mother, had spilled some hair gel in the car and had had to clean it up. The mother later said that Terry and Cindy had spilled the gel. Here "medicine" as used by Heather almost certainly referred to a commercial product.

As to Heather's reputation for truthfulness and as to whether she had any tendency to fantasize, her mother was asked at trial whether Heather ever lied to her and replied, "Not a lie. She's only three years old." Asked if Heather knew the difference between a lie and a truth, her mother said, "As well as any three-year-old does." Pressed on cross-examination, her mother admitted that when Heather was "fighting" with her ten-year-old brother David, she would blame David, not necessarily truthfully, "things like that"--for example, Heather had blamed David for breaking the back of the toilet seat.

On September 23, 1986, on the same occasion on which she first accused Terry to Connie Martin and her husband, Heather also declared to Connie, "Terry had made her mother Leslie pull down her pants and he pulled down his pants, and 'he put his pee pee in

where she pee pees.' " Heather's mother testified that she had never had a sexual relationship with Webb. On this point either her mother lied or Heather lied or fantasized. There is no way of telling which alternative is true. It is clear that her mother did not believe Heather spoke truthfully about this significant sexual action Heather said that Terry had performed.

On September 30, 1986, Heather told Connie: "I can't talk any more about my mother being a bad girl and pulling her panties down because she's going to get really sick and she's going to cry and the cops is going to get really mad at me." Her mother testified that she never told Heather not to talk about Terry. Again it is evident that her mother believed that Heather had not told the truth to Connie. Did her mother instruct Heather not to repeat the charge about her and Terry having sex? According to her mother's testimony, Heather lied about her mother's instructions.

If Heather had in fact observed sex between a man and her mother, it seems possible, if not actually probable, that she could fantasize that Terry had done something similar with her. Her motive would have been to absorb or cushion the trauma of seeing her mother

engaged in intercourse. Leslie Morton, in fact, admitted that she had had intercourse with Terry's brother Irwin, although she denied that Heather could have seen it. Irwin refined Leslie Morton's admission by saying Leslie had given him oral sex; like Leslie he denied that Heather had seen them.

In summary, Heather was inconsistent in her accusations and in her use of the key accusatory term. She did not use unusually sophisticated language in setting out the accusations. She had a possible motive to fabricate them. According to Irwin Webb and her own mother she did fabricate another sexual accusation. Her videotape statements carry far fewer guarantees of trustworthiness than those rejected by the Supreme Court of Idaho and by the United States Supreme Court in *Idaho v. Wright*.

[8] The videotape was inadmissible evidence seen by the jury and brought into the jury room during the jury's deliberations. Admission of this evidence violated in a gross fashion Webb's right to confront the evidence against him. After a careful review of the entire transcript of the trial, we conclude that this inadmissible evidence had an actual and prejudicial effect upon the jury. *Brecht*

v. Abrahamson, --- U.S. ----, ----, 113 S.Ct. 1710, 1722, 123 L.Ed.2d 353 (1993). Consequently Webb's conviction must be set aside.

As the use of the videotape alone was such a substantial violation of Webb's Confrontation Clause rights, we need not on this appeal evaluate the further violations alleged by the admission of hearsay reported by Connie Martin and by Leslie Morton. If, however, these statements are to be used again they must be reevaluated in the light of this opinion and of Idaho v. Wright. Their earlier admission under a statute now found by Arizona to be unconstitutional is now irrelevant.

Accordingly, the judgment of the district court is reversed. The district court is ordered to issue the writ sixty days from the issuance of the mandate, unless within that time the state of Arizona indicates to the district court its intention to retry Webb. In that event, the district court shall order Webb released to the proper authorities for the purposes of retrial.

T.G. NELSON, Circuit Judge, dissenting:

Although I agree with the majority that the videotaped interview between Proctor and Heather was not admissible pursuant to the medical diagnosis exception, I dissent from the majority's conclusion that Heather's videotaped statements were not admissible pursuant to the residual exception because they lacked particularized guarantees of trustworthiness.

The Supreme Court has held that particularized guarantees of trustworthiness are to be determined from "the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief." *Idaho v. Wright,* 497 U.S. 805, 820, 110 S.Ct. 3139, 3149, 111 L.Ed.2d 638 (1990). The Court concluded there is no exclusive set of factors to be evaluated to determine the trustworthiness of a statement. Consequently, it advised that courts are to be given "considerable leeway in their consideration of appropriate factors." *Id.* at 822, 110 S.Ct. at 3150.

In this case, the majority reviews the facts surrounding Heather's statements and holds that the only possible conclusion to be drawn from Heather's use of age-appropriate language and the spontaneity

of her statements is that Heather's statements were unreliable. I disagree and believe that the majority's method of adopting a singular inference from factors which support multiple inferences is contrary to Wright and deprives courts of their broad discretion to consider the relevant factors in each particular case.

I disagree that Heather's failure to use language "unexpected of a child of similar age" supports the conclusion that her statements were unreliable. The Court in Wright did note that the declarant's use of terminology unexpected of a child of similar age is a factor indicating reliability. *Id.* at 821, 110 S.Ct. at 3149. However, relying on the converse, the majority states the fact that Heather's language was not unexpected of a child of similar age as a basis for its conclusion that Heather's statements lacked guarantees of trustworthiness.

It is true the anatomical terms used by Heather were entirely consistent with a child of similar age of two and one-half years. She referred to both male and female genitals as "things," to the posterior area as "butt," to female breasts as "boo-boos," and specifically to Webb's penis as "pee-pee." In *Swan v. Peterson,* 6

F.3d 1373 (9th Cir.1993), *petition for cert. filed* (April 18, 1994), we approved of the trial court's reliance on the child declarant's description of "sexual acts in specific terms, using age-appropriate language" as a factor supporting reliability. Id. at 1380 (emphasis added). We noted consideration of this factor was consistent with the Supreme Court's statement in Wright that courts have considerable leeway in their consideration of appropriate factors. Id. However, contrary to Swan, the majority establishes a bright-line rule that only language inappropriate for a child of similar age indicates reliability.

I do not agree that Heather's use of age-appropriate terminology supports the conclusion that her statements were unreliable. A child molester cannot be expected to offer a course in correct anatomical terminology while molesting a child, nor could a child as young as Heather be expected to remember such terminology even if it were used. The crucial inquiry should not be whether the language is appropriate or inappropriate for a child of similar age, but whether the language employed by the child adequately describes a sexual encounter. Heather did describe explicit sexual encounters with

specificity in age-appropriate language. An example of one such statement is Heather's claim that Webb pee-peed in her mouth. Surely, this language is explicit enough to ensure the truthfulness of Heather's claim that Webb had sexually abused her, regardless of the fact that Heather did not use sophisticated language.

I also disagree with the majority's conclusion that no incriminating statement can be considered spontaneous if the child has been previously questioned about the abuse. The Supreme Court in Wright cites with approval a case relying on spontaneity and consistent repetition as factors indicating reliability. See *Wright,* 497 U.S. at 821, 110 S.Ct. at 3149. However, according to the majority, the spontaneity of Heather's statements to Proctor is a factor indicating unreliability. The majority reasons that because Heather had been questioned by her care-givers and investigators regarding her accusations prior to the videotaped interview with Proctor, Heather's spontaneous accusation during the interview "must be stamped as insufficiently reliable and as the product of previous questioning." Maj. op. 1084. The majority's reasoning

stands for the proposition that if there has been any prior investigation, spontaneity can never be a factor supporting reliability.

Adherence to such a proposition would immunize sexual abusers from all but one accusatory statement of those children they abuse, i.e., the first spontaneous statement of the abused child. After a child's first spontaneous statement alleging abuse, an investigation of the child's claim will necessarily ensue, and the focus of the investigation will be on the child. Pursuant to the majority's reasoning, however, investigators may not question the child, otherwise, any future statements by the child are unreliable. Conversely, if the investigators do not question the child, they cannot determine if there is any substance to the child's complaint. Thus, prosecution of a sexual abuser of a very young child such as Heather can never occur, either because the child cannot be questioned, or because the child has been questioned. The fact that the child is willing to talk without prompting at subsequent discussions regarding the abuse, as Heather did during her interview with Proctor, cannot be a factor indicating unreliability. If it were,

every investigation would inevitably lead to the conclusion that the case cannot be successfully prosecuted.

Finally, the majority is critical of Proctor's description of Webb as bad. However, the majority fails to place Proctor's comments in context. Proctor's first comment about Webb, i.e., that Webb should be told not to pee pee in Heather's mouth, occurred twenty minutes into the interview after Heather had already said that 1) Webb pulled down his pants; 2) he put medicine[1] in "there" (pointing to her vaginal area); 3) his penis "got little" afterwards; and 4) he pee-peed in her mouth. While Proctor's comment was inappropriate, it should not distract us from the proper inquiry: Were Heather's statements prior to Proctor's first negative comment sufficiently shown to be reliable? I conclude that they were. Heather's statements were in age-appropriate language; they were internally consistent; and they were spontaneous or in response to

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[1]The majority contends Heather's statements were inconsistent because she used the term "medicine" when referring to hair gel and also when referring to what "could have been understood to mean ... semen." Maj. op. 1084. The majority, without basis, presumes Heather was referring to semen when she indicated Webb put medicine in her vaginal area. However, what it fails to recognize is that perhaps what Heather meant by medicine was a clear liquid gel--such as a lubricant.

appropriate, non-leading questions. The majority's statement that the Proctor's repetitious questions would not have been permitted by a court is incorrect. Trial courts have great latitude in handling young or vulnerable witnesses. See *United States v. Castro-Romero,* 964 F.2d 942, 944 (9th Cir.1992) (holding district court did not abuse its discretion by allowing Government to ask leading questions of eight-year-old witness reluctant to testify regarding sexual abuse).

Under the totality of the circumstances surrounding the interview, up until Proctor began to denigrate Webb, I believe Heather's videotaped statements met the test of Wright. Thus, the only remaining inquiry is whether Proctor's comments rendered the admission of the tape an error of constitutional dimension. Proctor made three negative comments about Webb. After the first negative comment, Heather said that Webb did it more than one time; Cindy watched but did not say anything; Webb's "thing" touched her vaginal area; and Webb took pictures while he was doing a bad thing. Heather later retracted the statement about the pictures.

Proctor's gratuitous negative comments about Webb were clearly improper. They had the capacity to color Heather's following

statements. However, I do not believe the admission of this later portion of the videotape rose to the level of a constitutional error. The majority of Heather's incriminating statements were elicited before Proctor began to counsel her. At most, admission of the last minutes of the videotaped interview was harmless error. As the Supreme Court in *Wright* noted, "the presence of corroborating evidence ... indicates that any error in admitting [a] statement might be harmless." 497 U.S. at 823, 110 S.Ct. at 3150 (footnote omitted). In this case, corroborating physical evidence existed to support Heather's claim that she had been sexually abused: Heather's examining physician testified that Heather's physical condition was consistent with sexual abuse.

After killing the tape and burying it, the majority digs it up and buries it again by discussing all the extrinsic evidence demonstrating its unreliability. I dissent from the several pages of dicta offered by the majority during this second burial. In this dicta, the majority concludes that extrinsic evidence bolsters its conclusion that Heather's statements are unreliable reasoning that "Wright does not forbid recourse to other evidence that confirms the presumptive

unreliability of the hearsay." Maj. op. 1084. In *Wright,* the Supreme Court held that extrinsic evidence could not be used to bolster the reliability determination. See 497 U.S. at 823, 110 S.Ct. at 3150. It did not hold, however, that extrinsic evidence could be used to bolster the presumptive unreliability of the hearsay. Having already held that the presumption of unreliability of Heather's statements had not been overcome, there is simply no reason for the majority to decide the flip side of Wright in this case. Further, in doing so, the majority ignores our previous statement in Swan regarding the use of extrinsic evidence to establish unreliability:

> Wright forbids using other corroborating evidence at trial to show that an initial hearsay statement is reliable. The issue here is subtly different: can arguable noncorroborating evidence be used to demonstrate the unreliability of a hearsay statement? Wright's caution against reference to other evidence at trial suggests not. *Swan,* 6 F.3d at 1381 (footnote omitted).

In sum, I cannot agree with the majority's method of adopting singular inferences from factors to support its conclusion, thereby ignoring many other reasonable inferences to be drawn from those

factors. Furthermore, I dissent from the extensive dicta offered by the majority. In the future, the question of whether noncorroborating evidence may be used to demonstrate unreliability should be addressed in a case where the answer is needed, unhampered by the decision in this case.

APPENDIX B

[filed Jan. 20, 1995]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TERRY L. WEBB,	)	No. 93-16167
	)	
Petition-Appellant,	)	D.C. No.
	)	CV-90-01608-SMM
	)	
v.	)	ORDER
	)	
SAMUEL A. LEWIS,	)	
	)	
Respondent-Appellee.	)	
	)	

Before: FERGUSON, NOONAN and T.G. NELSON, Circuit Judges

The majority of the panel as constituted in the above case has voted to deny the petition for rehearing. Judge Noonan voted to reject the suggestion for rehearing en banc and Judge Ferguson so recommended. Judge Nelson voted to grant the petiton for rehearing and to accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petiton for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

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No. _____

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

SAMUEL LEWIS, DIRECTOR OF DEPARTMENT OF CORRECTIONS, ARIZONA STATE PRISON
PETITIONER,

-VS-

TERRY L. WEBB,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDICES FOR PETITION FOR WRIT OF CERTIORARI

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APPENDIX C

[Filed May 3, 1993]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

TERRY L. WEBB, Petitioner v. SAM LEWIS, et al., Respondents.	)	CIV 90-1608-PHX-SMM JUDGMENT

This action came on for consideration before the Court, the Honorable , United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that having this Court adopting in part and rejecting in part the Report and Recommendation; Petitioner take nothing. This petition and action are hereby dismissed.

Dated at Phoenix, Arizona, this 3rd day of May 1993

RICHARD H. WEARE, Clerk

cc to: all counsel

By:_____
Deputy Clerk

[Filed May 3, 1993]

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

TERRY L. WEBB, Petitioner, v. SAM LEWIS, et al., Respondents.	)	CIV 90-1608-PHX-SMM ORDER

Petitioner is an inmate incarcerated in the Arizona State Prison Complex, Florence, Arizona. Petitioner was convicted of child molestation and sexual conduct with a minor in the Arizona State Court. Pending before this Court is Petitioner's Petition for Writ of Habeas Corpus. On July 15, 1992, the Magistrate Judge filed a Report and Recommendation that the Petition be denied on its merits because the admission of certain hearsay statements did not violate Petitioner's rights under the Confrontation Clause of the Sixth and Fourteenth Amendments. Plaintiff failed to file any objections to the

Report and Recommendation. Accordingly, Petitioner waived his right to have this Court address the Magistrate Judge's findings of fact de novo. See 28 U.S.C. section 636(b)(1). Also pending before the Court is Petitioner's motion for appointment of counsel.

I. BACKGROUND

Webb was charged and convicted in an Arizona State Court with one count of child molestation and one count of sexual conduct with a minor. After a jury trial, Webb was sentenced to consecutive prison terms of seventeen and twenty years.

At the time of the trial, the victim was three years old. During the trial, the trial court found the victim unavailable to testify as a witness because she was unwilling to talk about the alleged behavior of Webb. As a result, the trial court permitted four witnesses (the victim's mother, babysitter, psychotherapist and physician) to testify about certain out-of-court statements made by the victim. Additionally, the trial court permitted the jury to view a videotape of the victim conducted at the Children's Hospital and Health Center in San Diego, California. Webb objected to the statements and the videotape.

After his conviction and sentence, Webb filed a direct appeal, arguing that the admission of the victim's out-of-court statements violated his rights under the Confrontation Clause of the Sixth and Fourteenth Amendments. The Arizona Court of Appeals affirmed his conviction and the Arizona Supreme Court denied review.

As stated in the Report and Recommendation, Webb exhausted his state remedies with respect to the claims asserted in this federal habeas petition. All Claims were presented to the highest state court for review. Rose v. Lundy, 455 U.S. 509, 523, 102 S. Ct. 1198 (1982). Accordingly, the Report and Recommendation correctly found that the merits of Petitioner's claims should be addressed.

II. DISCUSSION

As the Report and Recommendation correctly states: "The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides: In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Maryland v. Crag, 110 S. Ct. 3157, 3162 (1991); Coy v. Iowa, 108 S. Ct. 2798, 2800 (1988). The right of confrontation includes physical presence of the

witness, forces the witness to testify under oath and submit to cross examination and permits the jury to observe the demeanor of the witness. Crag, 110 S. Ct. at 3163. The "combined effect of these elements" is to ensure the reliability of the evidence admitted against the accused. Id.

There is no absolute right to a face-to-face confrontation at trial. Id. at 3163. While the Confrontation Clause reflects a preference for face-to-face confrontation at trial, there may be certain narrow circumstances where competing interests warrant dispensing with confrontation at trial. Id. at 3165. One of these narrow circumstances may arise when a state has an "interest in the physical and psychological well-being of child abuse victims." Id. at 3167. Accordingly, the Confrontation Clause permits, where necessary, the admission of certain hearsay statements against a defendant, despite the defendant's inability to confront the declarant at trial. Id. at 3157.

In order to meet the requirements of the Confrontation Clause, the prosecution must (1) prove or demonstrate the unavailability of the declarant, whose statement it wishes to use and, (2) demonstrate

that the statement bears adequate indicia of reliability. Idaho v. Wright, 110 S. Ct. 3139, 3146 (1990). The "indicia of reliability" requirement is met when the hearsay statement falls under a "firmly rooted hearsay exception" or the statement is supported by a showing of particularized guarantees of trustworthiness. Id. at 3147.

Admission under a firmly rooted hearsay exception satisfies the Confrontation Clause because of the "weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements" Id. Admission under a showing of "particularized guarantees of trustworthiness" satisfies the Confrontation Clause, if under the totality of the circumstances surrounding the making of the statement, the evidence is at "least as reliable as evidence admitted under a firmly rooted hearsay exception." Id. at 3149.

In the present case, the state court found the victim unable to testify and, therefore, unavailable to testify at Petitioner's trial. At the time of the trial, the victim was three years old. Both the prosecution and defense counsel represented to the trial court that the victim was uncommunicative. Furthermore, defense counsel chose

not to call the victim as a witness. Accordingly, the Court agrees with the Report and Recommendation that the victim was an unavailable witness within the meaning of the Confrontation Clause.

Having determined that the victim was "unavailable" the trial court found that the hearsay statements made to the child's mother and baby sitter were admissible under A.R.S. section 13-1416 and "other exceptions to the hearsay rule." The trial court also found the statements made to the child's psychotherapist and physician admissible under exceptions to the hearsay rule.

A.R.S. section 13-1416 was held unconstitutional by the Supreme Court of Arizona. See State v. Robinson, 735 P.2d 801, 808 (1987). However, the Arizona Court of Appeals found that, despite the inappropriate admission of the statements under A.R.S. section 13-1416, the statements made to the victim's mother and babysitter were admissible under Arizona's catch-all hearsay exception. Admission of the statements made to the psychotherapist and physician were affirmed as statements made for purposes of medical diagnosis and treatment under Rule 803(4), Arizona Rules of Evidence.

The Report and Recommendation found the statements made by the child to her mother and babysitter not violative of the Confrontation Clause because there were particularized guarantees of trustworthiness and the statements fell under a firmly rooted hearsay exception. This Court adopts that part of the Report and Recommendation holding the statements had particularized guarantees of trustworthiness. However, the Court rejects that part of the Report and Recommendation holding that the victim's statements to her mother and babysitter fit into a firmly rooted hearsay exception.

Evidentiary questions are a matter of state Law. Estelle v. McGuire, 112 S. Ct. 475, 480 (1991). The Arizona Court of Appeals specifically held that the victim's statements to her mother and babysitter were not admissible under any of Arizona's hearsay exceptions, except for the catch-all provision. See Exhib. D. "[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution laws or treaties of the United States." Id.

Courts to determine if Petitioner's rights under the Confrontation Clause were violated. Id.; see also, Crag, 110 S. Ct. at 3163 (applying state evidentiary ruling in Confrontation Clause analysis).

A. Statements to Mother and Babysitter

A residual hearsay exception or catch-all exception is not a firmly rooted hearsay exception. Wright, 110 S. Ct. at 3147. A residual exception:

> . . . [A]ccommodates ad hoc instances in which statements not otherwise falling within a recognized hearsay exception might nevertheless be sufficiently reliable to be admissible at trial. Hearsay statements admitted under the residual exception, almost by definition, therefore do not share the same tradition of reliability that supports the admissibility of statements under a firmly rooted hearsay exception. Moreover, were we to agree that the admission of hearsay statements under the residual exception automatically passed Confrontation Clause scrutiny, virtually every codified hearsay exception would assume constitutional stature, a step this Court has repeatedly declined to take.

Id. 3147-48.

Because the catch-all provision is not a firmly rooted hearsay exception, the Court must determine if there were particularized guarantees of trustworthiness surrounding the making of the

statements to satisfy the Confrontation Clause. Wright, 110 S. Ct. at 3149.

While the Supreme Court specifically declined to create a "mechanical test" for determining particularized guarantees of trustworthiness, the Supreme Court recognized several factors useful in determining if a child victim's statements have sufficient indicia of reliability: (1) the spontaneity of the statement and its consistent repetition; (2) the mental state of the declarant; (3) use of terminology unexpected of a child of similar age; and (4) lack of a motive to fabricate. Wright, 110 S. Ct. at 3150. This list is not exhaustive. Id.

This Court adopts the Report and Recommendation that, under the totality of the circumstances, there were particularized guarantees of trustworthiness surrounding the making of the statements to satisfy the Confrontation Clause. When the victim made statements to her mother and babysitter, she was approximately two and one-half years old. She was suffering from the pain and distress of Petitioner's assaults. The victim made her initial statements without any prompting, and when she repeated her statements they were

consistent with one another. There also was no evidence that the victim had any motive to fabricate her story. Last, the statements expressed an unusual sexual knowledge for a child of two-and one-half years.

Accordingly, the Court holds that the admission of the victim's statements to her mother and babysitter did not violate Petitioner's rights under the Confrontation Clause.

B. Statements to Proctor and Strickland

Statements the victim made to her psychotherapist and physician were upheld under Arizona Rule of Evidence 803(4) and Arizona's catch-all provision. Rule 803(4) provides for the admission of statements which are:

> . . . made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Statements made for the purpose of diagnosis or treatment are considered a firmly rooted hearsay exception. Wright, 110 S. Ct. at 3152. The rationale for admitting such statements is that the declarant's motive for receiving proper medical care guarantees the

trustworthiness of the statements. The crucial question is whether the statement was reasonably pertinent to diagnosis or treatment. United States v. Nick, 604 F.2d 1199, 1202 (9th Cir. 1979).

Proctor was the victim's psychotherapist and Strickland was the victim's medical doctor. The record is unclear on the victim's motive for making the statements. However, the statements were elicited in the course of her diagnosis by Proctor and Strickland. Accordingly, the Court cannot say that admission of these statements violated Petitioner's rights under the Confrontation Clause.

Additionally, there were particularized guarantees of trustworthiness surrounding the making of these statements. The statements were made without the use of leading questions and showed an unusual knowledge of sexual conduct for a two and one-half year-old child. The statements also were consistent with those made previously to her mother and babysitter. Thus, the totality of the circumstances surrounding the making these statements have particular guarantees of trustworthiness to satisfy the Confrontation Clause.

Accordingly, the Petition for writ of habeas corpus is dismissed.

III. MOTION FOR APPOINTMENT OF COUNSEL

Also pending before the Court is Petitioner's Motion for Appointment of Counsel. Indigent state prisoners applying for habeas corpus relief are not entitled to appointed counsel unless the circumstances indicate that appointed counsel is necessary to prevent due process violations. Chaney v. Lewis, 801 F.2d 1191, 1196 (9th cir. 1986), cert. denied, 481 U.S. 1023, 107 S. Ct. 1911, 95 L. Ed 2d 516 (1987); Kreiling v. Field, 431 F.2d 638, 640 (9th Cir. 1970); Eskridge v. Rhay, 345 F.2d 778, 782 (9th Cir. 1965), cert. denied, 382 U.S. 996, 86 S. Ct. 582, 15 L. Ed. 2d 483 (1966). Further, the Court has discretion to appoint counsel when "the interests of justice so require." 18 U.S.C. § 3006A(a)(2) (1988). Petitioner has not made the necessary showing for appointment of counsel.

CONCLUSION

The Petition for writ of habeas corpus shall be dismissed. The Court adopts the Report and Recommendation that statements made by the child to her mother and babysitter did not violate the Confrontation Clause because there were particularized guarantees of trustworthiness. The Court rejects the Report and

Recommendation that these statements fall under a firmly rooted hearsay exception. Additionally, statements made to the child's psychotherapist and physician did not violate the Confrontation Clause because they were admitted under the firmly recognized exception of statements made for the purpose of diagnosis and treatment. These statements also were surrounded by particularized guarantees of trustworthiness.

IT IS THEREFORE ORDERED adopting in part and rejecting in part the Report and Recommendations.

IT IS FURTHER ORDERED denying the Petition for writ of habeas corpus.

IT IS FURTHER ORDERED denying Petitioner's Motion for Appointment of Counsel (DOC. #25).

DATED this 30th day of April, 1993.

Stephen M. McNamee
United States District Judge

copies to all counsel and Terry L. Webb

APPENDIX D

[Filed July 20, 1992]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

TERRY L. WEBB, Petitioner, v. SAM LEWIS, et al., Respondents.	)	CIV 90-1608-PHX-SMM (SLV) REPORT AND RECOMMENDATION

TO THE HONORABLE STEPHEN M. McNAMEE:

Terry L. Webb, presently confined at the Arizona State Prison Complex in Florence, Arizona, filed a *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. Respondents filed an Answer and Petitioner replied.

BACKGROUND

Webb was charged by the State of Arizona with one count of child molestation and one count of sexual conduct with a minor.

The victim, Heather, was only three years old at the time of Webb's jury trial. Following an unsuccessful attempt, pursuant to A.R.S. §13-4253(B),[1] to videotape her testimony, the trial court declared that Heather was unavailable as a witness. She did not testify.

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1. A.R.S. §13-4253(B) provides:

> The court, on motion of the prosecution, may order that the testimony of the minor be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding. Only those persons permitted to be present at the taking of testimony under subsection A may be present during the taking of the minor's testimony, and the persons operating the equipment shall be confined from the minor's sight and hearing as provided by subsection A. The court shall permit the defendant to observe and hear the testimony of the minor in person but shall ensure that the minor cannot hear or see the defendant. The court shall also ensure that:
>
> 1. The recording is both visual and aural and is recorded on film or videotape or by other electronic means.
>
> 2. The recording equipment was capable of making an accurate recording, the operator was competent and the recording is accurate and is not altered.
>
> 3. Each voice on the recording is identified.
>
> 4. Each party is afforded an opportunity to view the recording before it is shown in the courtroom.

Four witnesses (Heather's mother, a baby sitter and two psychotherapists) were allowed to testify, over Webb's objection, about certain out-of-court statements which Heather made to each of them. In addition and also over Webb's objection, the jury was shown a videotaped interview of Heather conducted at the Children's Hospital and Health Center in San Diego, California.

Webb was convicted as charged and sentenced to consecutive prison terms of seventeen and twenty years. He filed a direct appeal, alleging that his rights pursuant to the Confrontation Clause of the Sixth Amendment were violated by the admission into evidence of the out-of-court statements and the videotape. The Arizona Court of Appeals affirmed his conviction and the Arizona Supreme Court denied Webb's Petition for Review.

EXHAUSTION OF REMEDIES

A state prisoner must have exhausted his state remedies in all claims contained in a habeas corpus petition before such a petition will be considered by the federal court. *Rose v. Lundy*, 455 U.S. 509, 523, 102 S.Ct. 1198, 1205, 71 L.Ed.2d 379 (1982); *accord* 28 U.S.C. §2254(b). A petitioner must present his claims to the state

courts on direct appeal or through collateral proceedings. *Lindquist v. Gardner*, 770 F.2d 876, 877 (9th Cir. 1985); accord *Sweet v. Cupp*, 640 F.2d 233, 236 (9th Cir. 1981); 28 U.S.C. §2254(c). The exhaustion requirement as to a particular claim is satisfied once that claim has been fairly presented to the highest state court. *Middleton v. Cupp*, 768 F.2d 1083, 1086 (9th Cir. 1985), *cert. denied*, 478 U.S. 1021, 106 S.Ct. 3336, 92 L.Ed.2d 741 (1986). A claim is "fairly presented" if the petitioner has described the operative facts and legal theories on which his claim is based. *Picard v. Conner*, 404 U.S. 270, 277-8, 92 S.Ct. 509, 513, 30 L.Ed.2d 438 (1971); *Tamapua v. Shimoda*, 796 F.2d 261, 262 (9th Cir. 1986).

The constitutional issues raised by Webb in this action were previously raised in his direct appeal. Webb presented his claims to the highest state court for review and thereby exhausted his state court remedies.

DISCUSSION

Webb challenges his conviction on the grounds that it violated his right to confront and cross-examine witnesses against him, as guaranteed by the Sixth and Fourteenth Amendments.[2]

The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Maryland v. Craig,* ___ U.S. ___, 110 S.Ct. 3157, 3162, 111 L.Ed.2d 666 (1990); *Coy v. Iowa,* 487 U.S. 1012, 1015, 108 S.Ct. 2798, 2800, 101 L.Ed.2d 857 (1988); *Kentucky v. Stincer,* 482 U.S. 730, 736, 107 S.Ct. 2658, 2662, 96 L.Ed.2d 631 (1987); *Ohio v. Roberts*, 448 U.S. 56, 62, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597 (1980).

> This language "comes to us on faded parchment" (citation omitted) with a lineage that traces back to the beginnings of Western legal culture. There are indications that a right of

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2. Whether the challenged evidence was admitted into evidence in violation of Arizona's hearsay rules in an issue of state law. The only question before this court is whether Webb was denied his Sixth Amendment right to confront the witnesses against him. *See Nelson v. Farrey,* 874 F.2d 1222, 1226 (7th Cir. 1989).

> confrontation existed under Roman law. The Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges." Acts 25:16.

Coy v. Iowa, 487 U.S. at 1015, 108 S.Ct. at 2800.

The Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact. *Craig* at 3162; *Coy v. Iowa,* 487 U.S. at 1016, 108 S.Ct. at 2800.

"Simply as a matter of English" and "[s]imply as a matter of Latin as well", the Confrontation Clause confers at least a right to meet face to face all those who appear and give evidence at trial". *Id.* This interpretation derives not only from the literal text of the Clause, but also from an understanding of its historical roots. *Craig* at 3162. "Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say: 'Then call them to our presence--face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak. . .' Richard II, act 1, sc.1." *Coy v. Iowa,* 487 U.S. at 1016, 108 S.Ct. at 2800.

The Confrontation Clause provides two types of protection for criminal defendants:[3] the right to physically face those who testify against them and the right to conduct cross-examination. *Id.* The right to face-to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause--the right to cross-examination. Both ensure the integrity of the fact-finding process. *Id.*

The central concern of the Confrontation Clause is to ensure the reliability of the evidence introduced against a criminal defendant by subjecting it to rigorous testing in the context of an adversarial proceeding before the trier of fact. *Craig* at 3163. As noted in earlier Supreme Court decisions, the primary object of the Confrontation Clause was to prevent depositions or *ex parte* affidavits from being used in lieu of a personal examination and cross-examination of the witness. *Id.* More recently, the Court has described the literal right to confront the witness at the time of trial as forming the core of the values furthered by the Confrontation

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3. Webb addresses each of these two protections separately. We choose to address them together.

Clause. *Coy v. Iowa,* 487 U.S. at 1017, 108 S.Ct. at 2801. Face-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person. *Craig* at 3164. The Court has also noted the strong symbolic purpose served by requiring adverse witnesses at trial to testify in the accused's presence: "There is something deep in human nature that regards face-to-face confrontation between accused and accuser as essential to a fair trial in a criminal prosecution." *Id.*

While the Supreme Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, *Id.* at 3165; *Ohio v. Roberts,* 448 U.S. at 65, 100 S.Ct. at 2537, the Court has recognized that competing interests, if closely examined, may warrant dispensing with such confrontation. *Id.* at 64, 100 S.Ct. at 2538. Face-to-face confrontation is not the *sine qua non* of the confrontation right. *Craig* at 3164. The Court has never held that the Confrontation Clause guarantees criminal defendants an absolute right to face-to-face meeting at trial with witnesses against them, *Id.* at 3163; nor has the Court ever insisted on an actual face-to-face meeting at trial in every instance in which testimony is

admitted against a defendant. *Id.* at 3164. The Court has repeatedly held that the Confrontation Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite the inability to confront the declarant at trial. *Id.* Although hearsay rules and the Confrontation Clause are generally designed to protect similar values, the United States Supreme Court has been careful not to equate the prohibitions of the Confrontation Clause with the general rule prohibiting the admission of hearsay statements. *Idaho v. Wright,* ___ U.S. ___, 110 S.Ct. 3139, 3146, ___ L.Ed.2d ___ (1990). A literal reading of the Confrontation Clause would abrogate virtually every hearsay exception, a result long-since rejected as too extreme. *Craig* at 3165. Consequently, there has been a continuing struggle to define the relationship between the Confrontation Clause and the hearsay rule.

Rights conferred by the Confrontation Clause are not absolute and may give way to other important interests, particularly where those rights are only "reasonably implicit" in the Clause, such as the right to cross-examine and the asserted right to a face-to-face

confrontation at some point in the proceedings other than the trial itself. *Coy v. Iowa,* 487 U.S. at 1020, 108 S.Ct. at 2802-03.

The denial of the right to confront and cross-examine witnesses calls into question the ultimate integrity of the fact-finding process; but the right is not absolute, and although a competing interest must be closely examined, the right may bow to accommodate other legitimate interests in a criminal trial. *Chambers v. Mississippi,* 410 U.S. 284, 295, 93 S.Ct. 1038, 1046, 12 L.Fd.2d 923 (1965). *Nelson v. Farrey* at 1310.

While exceptions may exist to ". . .the irreducible literal meaning of the clause: 'a right to *meet face to face* all those who appear and give evidence *at trial*. . .'" (Citation omitted) (Emphasis in original) *Craig* at 3163, the right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assure. *Id.* at 3166.

A state's interest in protecting minor victims of sex crimes from further trauma and embarrassment is a compelling one and "a State's

interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." *Id.* at 3167.

The Confrontation Clause operates in two separate ways to restrict the admissibility of hearsay evidence. If the prosecution wishes to use an out of court statement against the defendant, it must usually produce the declarant, or demonstrate his or her unavailability. *Ohio v. Roberts,* 448 U.S. at 65, 100 S.Ct. at 2538. Once it is demonstrated that the declarant is unavailable, the hearsay statement is admissible only if it bears adequate indicia of reliability. *Id.* at 66, 100 S.Ct. at 2539. "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." Otherwise the evidence must bear "particularized guarantees of trustworthiness." *Id.*

A. Unavailability

A witness is not unavailable for purposes of Confrontation Clause analysis unless the prosecution has made a good-faith effort to obtain her presence at trial. *Ohio v. Roberts,* 448 U.S. 45, 74, 100 S.Ct.

2531, 2543, 65 L.Ed.2d 597 (1980). The burden is on the prosecution to establish the unavailability of the witness. *Id.* A witness cannot be declared unavailable simply because the prosecutor or court concludes that the witness might not want to testify, *Nelson v. Farrey,* 874 F.2d 1222, 1230 (7th Cir. 1989).

The constitutional issues in this case closely resemble those involved in *two other Arizona cases, State v. Robinson,* 153 Ariz. 191, 735 P.2d 801 (1987) and *State v. Allen*, 157 Ariz. 165, 755 P.2d 1153 (1988).

Robinson involved a defendant convicted under Arizona law of two counts of sexual conduct with a minor and two counts of child molestation. At issue was the admission into evidence of certain out of court statements of a five year old victim, Nicole. Nicole did not testify at Robinson's trial. Having attempted to testify at Robinson's previous trial,[4] the judge presiding at the second trial found her legally unavailable to testify due to an existing mental infirmity. He based his finding on expert testimony indicating that Nicole would be uncommunicative if asked about the assault and could be further

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4. This first trial ended in a hung jury.

proceedings. He also reviewed the transcripts of Nicole's prior attempts at live and videotaped testimony. Based on this evidence, he concluded that Nicole was incapable of testifying about the event. *Robinson* at 195, 735 P.2d at 805.

The Arizona Supreme Court expressed a preference that the trial judge personally examine the declarant prior to making such a determination of unavailability. Nonetheless, the court found that there was sufficient evidence in the case to support the discretionary determination of the judge that Nicole was unavailable as a witness. *Id.* at 203–04, 735 P.2d at 813–14.

In *Allen*, the defendant was convicted of one count of child molestation. The victim was a six year old girl named Cara. Cara did not testify at trial. All the evidence about the crime charged came from the testimony of her mother and an investigating police officer. *Allen* at 166, 755 P.2d at 1154. No physical evidence of abuse was presented by the prosecution. *Id.* at 170, 755 P.2d at 1158.

motion to videotape the victim's testimony; and in *Allen,* as in this case, the victim was unresponsive. *Id.* at 169, 755 P.2d at 1157.

The court in *Allen* sidestepped the issue of availability, finding that the defendant waived the issue by failing to object. *Id.* at 170, 755 P.2d at 1158. The court commented in passing that the trial judge had ruled the witness unavailable, based solely upon the prosecutor's statement that the child was unable to testify. The court further noted that although the trial judge was present at the aborted videotaping session where the victim could not answer questions, "we do not believe that this coupled with the prosecutor's statement would have constituted a sufficient determination [of unavailability] . . . " *Id.* at 169, n.9, 755 P.2d at 1157, n.9.

In the case at bar, there was no expert testimony regarding Heather's inability to testify at trial or the trauma such testimony might have caused her. The court apparently based its determination of unavailability solely upon Heather's refusal to answer questions at the videotaping session (at which the trial judge was present) and

uncommunicative.

Although this might not pass muster under Arizona law (*See Allen* at 169, n.9, 755 P.2d at 1157, n.9), this court cannot say that the Confrontation Clause was violated by the trial court's exercise of discretion. Webb had the opportunity to call Heather as a witness and chose not to do so. As pointed out by the court in *Robinson:*

> In addition to the factors considered by the trial judge, we note that defense counsel apparently could have called Nicole as a defense witness (the trial judge did not find Nicole incompetent) if he thought here testimony was in Robinson's best interest. Although the state bears the burden of proving unavailability when it offers the declarant's out-of-court statements, defense counsel's unwillingness to call Nicole as a defense witness is not irrelevant. . . .[I]t is difficult to find a clear violation of the confrontation clause when, as here, the state has facially valid reasons for not calling the declarant, the state's hearsay evidence is supported by particularized guarantees of trustworthiness, the record supports the trial court's finding that the witness is incapable of testifying, and the defendant makes no attempt to call the witness even though she was physically present.

Id. at 204, n.15, 735 P.2d at 814, n.15.

Given Heather's extremely young age, the trial judge's personal observation of her unwillingness to answer questions at the videotaping session and the tactical decision of defense counsel to

forego calling her as a defense witness, it is the opinion of this court that the trial court's finding of her unavailability did not violate the Confrontation Clause.

B. Sufficient Indicia of Reliability

The burden is on the state, as the proponent of evidence presumptively barred by the hearsay rule and the Confrontation Clause, to prove that the evidence in controversy bore sufficient indicia of reliability to withstand scrutiny under the Confrontation Clause. *Wright* at 3147.

Wright involved a defendant who was charged under Idaho law with two counts of lewd conduct with a minor, specifically her 5 1/2 and 2 1/2 year old daughters. The trial court conducted a *voir dire* examination of the younger daughter, who was three years old at the time of trial, to determine whether she was capable of testifying. The court concluded, and the parties agreed, that the younger daughter was "not capable of communicating to the jury." *Wright* at 3143. Nonetheless, the court admitted, pursuant to Idaho's residual hearsay exception, certain statements which she had made to a pediatrician having extensive experience in child abuse cases.

Wright asserted that the admission of these statements violated her rights under the Confrontation Clause and the Supreme Court agreed, finding "no special reason for supposing that the incriminating statements were particularly trustworthy." *Id.* at 3152.

In *Wright,* the Supreme Court reaffirmed its "suggestion" in *Roberts* that the indicia of reliability requirement could be met in either of two ways: "where the hearsay statement 'falls within a firmly rooted hearsay exception,' or where it is supported by 'a showing of particularized guarantees of trustworthiness.'" *Id.*

Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements. *Id.* By contrast, residual hearsay exceptions accommodate ad hoc instances in which statements not otherwise falling within a recognized hearsay exception may be found to be sufficiently reliable to be admitted at trial. *Id.* Hearsay statements admitted under the residual exception, "almost by definition", do not share the same

tradition of reliability that support admission under a firmly rooted hearsay exception. *Id.* at 3148.

The trial judge in this case based his evidentiary rulings on Arizona Revised Statutes §§ 13-1416 and 13-4252.[5] In ruling that each of the challenged statements was admissible, however, the trial judge found each to have a sufficient indicia of reliability. Our review of the record reveals that each of the statements was admissible pursuant to a firmly rooted hearsay exception. Furthermore, we find that each statement is supported by "particularized guarantees of trustworthiness". Consequently, the admission of the statements did not violate Webb's rights under the Confrontation Clause.

1. Statements to Connie Martin and Linda Morton were admissible pursuant to a firmly rooted hearsay exception.

The statements made by Heather to Connie Martin and her mother, Linda Morton, were admissible under the "excited

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5. A.R.S. §13-1416 has since been held unconstitutional by the Arizona Supreme Court. *See State v. Robinson*, 153 Ariz. 191, 198, 735 P.2d 801, 808 (1987).

utterance" exception to the hearsay rule.[6] To qualify as an excited utterance, the declarant must have experienced a startling event or condition and reacted while under the stress or excitement of that event and not from reflection and fabrication. *Morgan v. Foretich,* 846 F.2d 941, 947 (4th Cir. 1988). The testimony of Silvia Strickland, M.D. was sufficient to justify a finding that Heather had been sexually abused. The question therefore is whether or not Heather was under the stress of this "startling event" when she made her statements to her mother and Connie Martin or whether they could have resulted from "reflection and fabrication".

It is undisputed that Heather made her first references to the sexual abuse, at least several weeks after the abuse took place. In a case involving the sexual abuse of a child, however, the lapse of time between the "startling event" and the out-of-court statements, while relevant, is not dispositive in the application of the excited utterance rule. *Morgan v. Foretich* at 947; *Iron Shell,* 633 F.2d 77,

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6. Fed. R. Evid. 803(2) and Ariz. R. Evid. 803(2) both provide:

> **Excited Utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

85 (8th Cir. 1980) *cert. denied,* 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981). Other appropriate factors to consider are:

1) The age of the declarant;

2) The physical and mental state of the declarant;

3) The characteristics of the event; and

4) The subject matter of the statements.

Morgan v. Foretich at 947; *Iron Shell* at 85-86.

When Heather made her statements to Connie Martin, on or about September 23, 1986, she was approximately two and one-half years old. She first told Martin, without prompting, that Terry had put medicine in her and that Terry was either a bad man or a bad boy and that he hurt her. When asked an open-ended, non-leading question, "Why is Terry a bad man?", she responded, while pointing to her vaginal area, that he put medicine up inside her. She stated that he pulled his pants down and stuck his finger up inside her; and that it hurt her were she went "pee-pee" and hurt her "tummy". When asked where this occurred, Heather stated that Terry put her in bed and told her to shut her eyes. When asked if Terry had said anything to her, Heather responded by doubling up her fist, putting

it in Martin's face and saying "Terry say, 'Don't you tell, Heather!'". A little while later, while passing a motel where Webb had admittedly lived and where Heather had on occasion stayed, Heather appeared to be afraid of the motel, saying that Terry was in there and was going to hurt her.

During the next couple of days Heather repeated her statements; and on or about September 30, 1986, she stated Terry had put his "pee-pee" in her mouth and that it dripped in her mouth and made her gag. She said she wanted to try to get the medicine out of her throat.

The next day, also completely unsolicited, Heather told Martin that Terry had put his "pee-pee" in her side. When asked where in her side, Heather sat down spread-eagle and pointed to her vaginal area.

Some time around the end of September 1986, contemporaneously with her statements to Connie Martin, Heather saw her mother applying some vaginal cream and, appearing shocked, asked her mother what she was doing. When Linda Morton explained that she

was applying medicine, Heather spontaneously replied that Terry had put medicine on her.

All of Heather's statements to her mother and Martin were spontaneous in nature and made with little or no prompting. If there is evidence of prior interrogation, manipulation, or prompting by adults, spontaneity may be an inaccurate indication of trustworthiness, *State v. Robinson,* 153 Ariz. 191, 201, 735 P.2d 801, 811 (1987); but there is no such evidence in this case. Nor was there any evidence that either Martin or Morton had any motive to lie about the statements made.

Heather's statements to her mother and Martin were made while she was still suffering psychological pain and distress from the assaults. Her childish terminology had a ring of truth to it and was entirely appropriate for a girl of her age. Furthermore, Heather was a mere two and one-half years old at the time the statements were made, which makes it all the more unlikely that reflection and fabrication were involved.

It is, in the words of the *Morgan v. Foretich* court, "virtually inconceivable" that a child of Heather's "tender years" would have

the extensive knowledge of sexual activities or the desire to lie about the sexual abuse that would be required to lie about a story such as Heather's.

For all of these reasons, we believe that Heather's statements to her mother and Connie Martin were admissible pursuant to the excited utterance exception.

2. Statements to Scheider and Proctor were admissible pursuant to a firmly rooted hearsay exception.

Heather's statements to Jacquie Scheider and Linda Proctor were hearsay, but were admissible as statements made for purposes of medical diagnosis or treatment.[7] The hearsay exception for statements made in furtherance of medical treatment is based on the rationale that the declarant's motive guarantees the trustworthiness of the statements since treatment will depend on what is reported.

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7. Rule 803(4) of the Federal Rules of Evidence and the Arizona Rules of Evidence provides for the admission of statements which are:

> . . .made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Morgan v. Foretich at 949. The crucial question involved in analyzing the admissibility of a statement under this hearsay exception is whether the out-of-court statement was reasonably pertinent to diagnosis or treatment. *United States v. Renville,* 779 F.2d 430, 436 (8th Cir. 1985); *see United States v. Nick,* 604 F.2d 1199, 1202 (9th Cir. 1979). The declarant's motive in making such a statement must be consistent with the purpose of promoting treatment; and the content of the statement must be the type which would be reasonably relied upon by the physician. *Morgan v. Foretich* at 949; *Renville* at 436; *Iron Shell* at 84. It is assumed that a patient has a strong motive to tell the truth when her treatment or diagnosis will depend on the information conveyed. The declarant's motive thus provides a sufficient guarantee of trustworthiness. *Renville*, 779 F.2d at 436.

In *Iron Shell*, the Eighth Circuit opined that statements relating to the identity of an individual allegedly responsible for personal injuries would seldom, if ever, be reasonably pertinent to diagnosis. *Id.* at 84. This opinion was qualified in *Renville,* however, where the Eighth Circuit held that statements made to a physician during

an examination, than an abuser is a member of the victim's immediate family, *are* reasonably pertinent to treatment. *Id.* at 436. The court found that such statements differ significantly from ordinary statements of fault, in that they are reasonably relied upon by a physician in treatment. *Id.* at 436–37. The court reasoned that "child abuse involves more than physical injury; the physician must be attentive to treating the emotional and psychological injuries which accompany this crime. (Citations omitted). The exact nature and extent of the psychological problems which ensue from child abuse often depend on the identity of the abuser." *Id.* at 437.

Although the court in *Renville* was specifically addressing child abuse which occurs at home, there is no rationale for failing to extend this rule to include situations such as this one, where the statements of identity refer to trusted friends of the family who frequently provide custody and care for the child.

> "The psychological sequelae of sexual molestation by a father, other relative, or family friend may be different and require different treatment than those resulting from abuse by a stranger. (Citation omitted) Furthermore, effective treatment may require that the victim avoid contact with the abuser, not just to prevent further abuse, but also to facilitate recover from past abuse."

State v. Robinson, 153 Ariz. 191, 200, 735 P.2d 801, 810 (1987).

Although Heather's statements were made to psychotherapists, nothing in the hearsay exception limits its application to physicians. Heather's statements were made for the purpose of diagnosis and treatment and were admissible under the hearsay exception.

Finally, the fact that most of Heather's statements to Ms. Proctor were presented to the jury via a videotape, rather than through the direct testimony of Ms. Proctor, has no affect on our analysis. As pointed out by the trial judge, since Ms. Proctor could have testified directly as to what Heather has stated in the interview, allowing the jury to view the interview on videotape could only enhance the accuracy of the statements.

3. Particular Guarantees of Trustworthiness

As discussed above, each of the disputed statements fell within a firmly rooted hearsay exception; even if this were not the case, the statements had "significant guarantees of trustworthiness" and for this reason as well, did not violate the Confrontation Clause.

The state and federal courts have identified a number of factors that are relevant in determining whether statements made by a child

witness in a child sexual abuse case bear particularized guarantees of trustworthiness under the Confrontation Clause. *Wright* at 3150. Some of these factors are spontaneity and consistent repetition, mental state of the declarant, use of terminology unexpected of a child of similar age and lack of motive to fabricate. *Id.* These factors are not exclusive and courts have considerable leeway in their determination of appropriate factors. The unifying principle is the relationship of these factors to whether it is "particularly likely" that the child declarant was telling the truth when the statement was made. *Id.*

Although the "particularized guarantees of trustworthiness" must be shown from the totality of the circumstances, the relevant circumstances encompass only those that surround the making of the statement and that render the declarant worthy of belief. *Id.* at 3148 & 3149. To be admitted, the evidence must be "so trustworthy that adversarial testing would add little to its reliability." *Id.* at 3149. In *United States v. Nick,* the court looked to Rule 803(24) of the Federal Rules of Evidence (the so-called "catch-all" rule) for a

"useful set of criteria" to use in conducting a confrontational clause analysis:

> The circumstances under which the statement was made must indicate a very high degree of reliability and trustworthiness; the statement must be offered as evidence of a material fact; the statement, although not essential for proof of the point for which it is offered, must be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts;" and the interest of justice will best be served by admission of the statement into evidence.

Id. at 1203.

Heather's statements were all made while she was still suffering psychological pain and distress from the assaults. They were in large part spontaneously or in made in response to non-leading questions. Her statements to the two psychotherapists were consistent with her previous statements and were also made in response to open-ended and non-leading questions. Her childish terminology has the ring of veracity and is appropriate to a child of her age. Her statements were unquestionably material and were more probative as to the identity of the assailant than any other evidence. Her declarations were more, rather than less, probative than testimony she might have been able to give months after the

event. *See id.* at 1204. Finally, the interests of justice were served by admitting Heather's declarations, given that she was the victim of a sexual assault and "far too young to appreciate the implications of the assault". *See id.*

Although the court in *Nick* also relied on corroborating physical evidence, the Supreme Court has specifically disapproved of the use of corroborating evidence to support a finding that a hearsay statement bears particularized guarantees of trustworthiness. Finding that the use of such corroborating evidence would allow the admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence, the Court held that hearsay evidence must possess indicia of reliability by virtue of its inherent trustworthiness, not by virtue of other evidence at trial. *Wright* at 3150. Corroboration of a child's allegations of sexual abuse by medical evidence of abuse, for example, sheds no light on the reliability of the child's allegations regarding the identity of the abuser. There is a very real danger that a jury will rely on partial corroboration to mistakenly infer the trustworthiness of the entire statement. *Id.* at 3151.

The Court did recognize that corroborating evidence might be an appropriate indication of whether any error in admitting the statement might be harmless. *Id.*

There is no need to depend on corroborating evidence in this case, for the statements themselves are "inherently trustworthy".

CONCLUSION

There is a compelling need for the admission of the hearsay statements of young sexual assault victims who are unable or refuse to verbally express themselves in court, when the child and the perpetrator are the sole witnesses to the crime. *State v. Sorenson,* 143 Wis.2d 226, 421 N.W.2d 77, 84 (1988). It is the modern rule that the administration of justice is best served, in cases involving young child victims of sexual assault, by the admission of their statements made in a more relaxed environment than the traditional courtroom setting, without the possibility of a traumatic courtroom encounter. *United States v. DeNoyer,* 811 F.2d 436, 438 (8th Cir. 1987).

Each of Heather's out-of-court statements fell within a firmly-rooted hearsay exception. Furthermore, the circumstances

surrounding each of Heather's statements strongly suggest the "particular guarantees of trustworthiness" necessary to avoid a violation of the Confrontation Clause. These include Heather's young age, her relationship to the witnesses and the lack of motive for any of the witnesses to fabricate or distort the contents of the statements. Many of the statements were spontaneous and all demonstrated remarkable consistency. The child-like terminology which Heather used in describing sexual acts and circumstances of which a child of her "tender years" should not have been aware also lend additional credibility to the statements.

For all of these reasons, we find that Webb's rights under the Confrontation Clause were not violated by the admission of Heather's out-of-court statements.

IT IS THEREFORE RECOMMENDED that the Petition for Writ of Habeas Corpus be denied.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's

judgment. The parties shall have ten (10) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. Thereafter, the parties have ten (10) days within which to file a response to the objections. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to *de novo* consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the recommendation of the Magistrate Judge.

DATED this 15 day of July, 1992.

STEPHEN L. VERKAMP
United States Magistrate Judge